

1 competition in your testimony between the
2 Tennis Channel and the Golf Channel. Right,
3 sir?

4 A Yes.

5 Q And 18 advertise on Versus.

6 Right, Mr. Herman? All but 12?

7 A Yes.

8 Q And that illustrates the
9 competition between Versus and Tennis Channel.

10 A I believe so.

11 Q And ESPN2 had 24 overlaps. Is that
12 right, sir?

13 A Yes.

14 Q Twenty-four or 25?

15 A Yes.

16 Q Now, Mr. Herman, the source data
17 for this chart, that comes from Nielsen AD
18 Views. Is that correct, sir?

19 A Yes.

20 Q And is that data that you review
21 in your ordinary course of business?

22 A Yes.

1 Q And that's data that can be
2 purchased. It's publicly available and they
3 keep track these sorts of overlaps. Right,
4 sir?

5 A They keep track of all --

6 Q All sorts of numbers?

7 A Yes.

8 MR. MOSS: May I approach with an
9 exhibit, Your Honor?

10 JUDGE SIPPEL: Yes, sir.

11 MR. MOSS: Now, Your Honor, we
12 looked at this same data that Mr. Herman used
13 to compile his chart and we've looked at other
14 networks.

15 BY MR. MOSS:

16 Q Mr. Herman, it's true that Nielsen
17 AD Views maintains data for networks other
18 than sports networks. Right, Mr. Herman?

19 A Yes.

20 Q Did you look at any of that data?

21 A I didn't look at that data to
22 compile this report.

1 MR. MOSS: May I, Your Honor?

2 JUDGE SIPPEL: Yes.

3 MR. MOSS: This is marked as
4 Exhibit 801.

5 (Whereupon, the document
6 referred to was marked
7 as Comcast Exhibit No.
8 801 for identification.)

9 JUDGE SIPPEL: This is a document
10 that was prepared by Comcast?

11 MR. MOSS: Yes, Your Honor.

12 JUDGE SIPPEL: And the number is
13 801. I see that. Comcast Exhibit 801.

14 MS. POGORILER: Your Honor, we
15 don't believe this data has been produced to
16 us.

17 MR. CARROLL: Your Honor, this is
18 public data that actually is available. All
19 we've done is complete the chart that Tennis
20 Channel prepared. Mr. Moss had objected to it
21 during direct you'll remember to their chart
22 being incomplete and said that we'd like to go

1 at it at cross. I think the witness has
2 explained he's familiar with the data and it's
3 public data. All we did was compile it.

4 MR. MOSS: And I also don't
5 believe that the underlying data from Mr.
6 Herman's chart was produced to us. I believe
7 that was withheld as work product.

8 MR. SCHMIDT: The chart itself was
9 certainly produced and --

10 JUDGE SIPPEL: The underlying data
11 wasn't though according to what --

12 MR. SCHMIDT: It wasn't requested.
13 I suspect we would have -- Well, I don't know
14 what the status of that was. Someone else
15 will have to speak to what happened with that.
16 But the chart itself was produced and as I
17 understand it Mr. Herman was subject to
18 deposition on the chart itself.

19 The chart we have now we don't
20 object to them and we've not objected to them
21 taking data that's been produced and doing
22 analyses on it or manipulating it and that has

1 come in.

2 But, as I understand this exhibit,
3 this exhibit is wholly new -- And correct me
4 if I'm wrong on this. If I'm wrong on this,
5 we'll withdraw this. This data includes
6 wholly new evidence that has not been produced
7 in the course of discovery.

8 MR. MOSS: Mr. Schmidt, the chart
9 Exhibit C was not prepared and Mr. Herman's
10 declaration of it -- Your Honor, this chart,
11 Exhibit C, we first saw this chart with Mr.
12 Herman's direct testimony in this case about
13 a week ago. And the underlying data has still
14 never been produced to us.

15 JUDGE SIPPEL: Has it been
16 requested?

17 MR. MOSS: We requested all of
18 their backup material, Your Honor, for their
19 testimony. Yes.

20 MR. CARROLL: Your Honor, we're
21 not objecting. We didn't fuss over their
22 chart even though we got it for the first time

1 in the direct testimony. All we want to do is
2 complete the chart.

3 If there is an issue to be raised
4 about anybody thinking the backup for this
5 chart that's compiled is not accurate, I'm
6 happy to pursue this with the other side
7 later. I don't think there is.

8 I think that we've just got
9 procedural issue and I would suggest that we
10 just move forward with this. I think the
11 witness has already indicated he doesn't
12 dispute the underlying data source that's used
13 for all of this. And if it's necessary for us
14 to tie this down with one of our witnesses
15 because there is any claim for any reason --
16 I don't think there can be -- that the data
17 for this is not substantiated by the chart
18 we'd be happy to do that.

19 But our objection is otherwise
20 they've introduced an incomplete chart for the
21 first time in the direct testimony of their
22 witness which again we've not objected to on

1 the basis that we would be able to put the
2 complete set in front of them.

3 MR. SCHMIDT: And here's what I
4 think happened with the direct testimony, Your
5 Honor. We received new data from their
6 witnesses in their direct. We have taken up
7 some of that with them.

8 They came back to us and said we'd
9 like data underlying analyses your experts
10 have done in the past couple weeks including
11 with respect to Dr. Singer or maybe only with
12 respect to Dr. Singer. I don't believe you've
13 come back to us on Table C.

14 Our point on this new exhibit,
15 Exhibit 801, is simply -- it may all be
16 accurate and I'm willing to accept your
17 representation as accurate -- I think you need
18 to have a witness to run that through with.
19 We do think it's unfair to pull out data that
20 we have not had any chance to test. But if
21 you have a witness you can put it through we
22 don't object to you doing that.

1 JUDGE SIPPEL: Well, I'm not going
2 to waste time with that. Who put this
3 together? Who put this thing together? Now
4 I'm looking at 801.

5 MR. MOSS: Yes. Comcast put this
6 together, Your Honor.

7 JUDGE SIPPEL: Was it done in-
8 house or was it done at the law firm or both?

9 MR. MOSS: It was done both, Your
10 Honor.

11 JUDGE SIPPEL: All right. And as
12 counsel of record you will verify as to the
13 accuracy of this information.

14 MR. MOSS: Absolutely, Your Honor.

15 JUDGE SIPPEL: Okay.

16 MR. SCHMIDT: We'll accept that,
17 Your Honor.

18 JUDGE SIPPEL: Okay. Good. Now
19 let's go forward then.

20 BY MR. MOSS:

21 Q Mr. Herman, I know you've never
22 seen this before. So I would just like to

1 explain to you.

2 A Okay.

3 Q So you're familiar with this chart
4 for the Court. Mr. Herman, this chart
5 includes all of the data that you have on your
6 Exhibit C. So we have Tennis Channel's top 30
7 advertisers along the left-hand side. And
8 then we have the extent to which they overlap
9 with the eight sports networks which you have
10 on your chart. And those eight sports
11 networks are highlighted in yellow on this
12 Comcast Exhibit 801.

13 A Okay.

14 Q Do you see that, sir?

15 A Yes.

16 Q And this also includes other
17 networks, about 25 other networks, that
18 Nielsen maintains AD Views data for. And you
19 said Nielsen does maintain AD Views data for
20 other networks. Right, sir?

21 A Yes.

22 Q And across the bottom, those big

1 bold numbers, those are numbers that indicate
2 the number of Tennis Channel's top 30
3 advertising accounts that also advertise on
4 these various networks. Do you understand,
5 sir, what the chart shows?

6 A Yes, I do.

7 Q And Tennis Channel's top 30
8 accounts have the most overlap on this chart
9 with NBC, ABC and CBS at 28, 26 and 26. Am I
10 reading the chart correctly, sir?

11 A Yes.

12 Q And it's not your testimony that
13 Tennis Channel competes more with broadcast
14 networks for advertising dollars than it does
15 with cable sports networks. Is it, sir?

16 A I don't believe we compete against
17 broadcast networks.

18 Q You don't believe you compete
19 against them at all.

20 A Correct.

21 Q But you have more overlap with
22 them than you do with any cable sports network

1 in terms of advertising according to this
2 chart. Right, sir?

3 A Okay.

4 Q Mr. Herman, I'd like to draw your
5 attention to the right of ESPN2. You have
6 CNN, Headline News and Fox News. Do you see
7 those three news networks?

8 A I'm sorry. To the right of?

9 Q To the right of ESPN2 with the
10 yellow highlighting.

11 A Yes.

12 Q CNN, Headline News and Fox News.

13 A Yes.

14 Q And those are all news networks.

15 Correct, sir?

16 A Yes.

17 Q Cable news networks?

18 A Yes.

19 Q And Tennis Channel's top 30
20 accounts have 25 overlapping with CNN.

21 Correct, sir? Am I reading that right?

22 A Yes.

1 Q And 24 with Headline News?

2 A Yes.

3 Q And 24 with Fox News?

4 A Yes.

5 Q And that's more than all of the
6 other sports networks other than ESPN and
7 ESPN2. Right, sir?

8 A Yes.

9 Q And it's not your testimony that
10 Tennis Channel competes more for advertising
11 dollars with cable news networks than it does
12 with cable sports networks.

13 A That's not my testimony.

14 Q Your testimony is that Tennis
15 Channel competes more with sports networks
16 other than -- more with sports networks than
17 with news networks. Correct?

18 A That's correct.

19 Q But Tennis Channel has more
20 advertising overlap at least according to this
21 chart with the cable news networks than it
22 does with the majority of cable sports

1 networks. Correct, sir?

2 A Correct.

3 Q And, Mr. Herman, I think you
4 testified earlier that you worked at the
5 Scripps Company. Correct?

6 A Yes.

7 Q And that Food Network and Home and
8 Garden TV are two networks that are part of
9 the Scripps family.

10 A Yes, they are.

11 Q And both of those networks would
12 be considered lifestyle networks. Correct,
13 sir?

14 A Yes.

15 Q And they both have, as I say, they
16 skew female. Their audience is more of
17 females than males. Correct, sir?

18 A Yes.

19 MR. MOSS: And Food Network, Mr.
20 Herman and Your Honor, is the red logo right
21 in the middle of the chart.

22 JUDGE SIPPEL: I see it.

1 BY MR. MOSS:

2 Q And Food Network has 21 overlaps
3 with the Tennis Channel. Correct, sir?

4 A Yes.

5 Q And Home and Garden which is right
6 next to the Food Network abbreviated HGTV,
7 that also has 21 overlaps. Correct, sir?

8 A Yes.

9 Q And that's more overlaps than
10 Versus, NFL Network, the Baseball Channel, the
11 Soccer Channel and the Basketball Channel.
12 Correct, sir?

13 A Correct.

14 Q In fact, .sir, most of these top 30
15 advertisers advertise on most of the networks
16 on this chart. Isn't that right, sir?

17 A Yes.

18 Q For example --

19 MS. POGORILER: Your Honor, if
20 specific names are going to come up, I think
21 we need to shut the door.

22 JUDGE SIPPEL: Okay. We might

1 have to go and camera all this.

2 MR. MOSS: Okay.

3 JUDGE SIPPEL: If we're going to
4 talk about specific companies.

5 Sorry, Mr. Make. I'm going to
6 have to ask you to leave.

7 MR. MOSS: Your Honor, let's try
8 to avoid that. I think that's fine.

9 MR. CARROLL: We're going to
10 change the question to try and avoid it, Your
11 Honor.

12 JUDGE SIPPEL: Yes.

13 MR. CARROLL: Try to move this
14 along for you.

15 BY MR. MOSS:

16 Q Mr. Herman, after looking at this
17 chart, you really can't conclude anything
18 about who competed based on just overlapping
19 advertisers, can you, sir?

20 A I would not agree or I wouldn't be
21 comfortable agreeing with your assessment.

22 Q So is it your testimony that you

1 can still conclude anything at all about
2 competition after looking at this chart with
3 respect to overlap?

4 A Based upon my experience in the
5 business, the answer is yes because
6 advertisers segment the portions of their
7 budgets by programming category. So they're
8 take a -- Clearly, in this case,
9 segmented --

10 MS. POGORILER: Just a second, Mr.
11 Herman. Your Honor, if we are going to do the
12 names we should -- before you add anything to
13 that, we should probably shut the door.

14 JUDGE SIPPEL: Okay. I'm with
15 that.

16 I'm sorry, Mr. Make.

17 MR. MOSS: Sorry, Your Honor. We
18 tried to do it.

19 JUDGE SIPPEL: No. You did the
20 best you can.

21

22

CLOSED SESSION

JUDGE SIPPEL: How are you doing
on time?

MR. MOSS: Close, Your Honor.

MS. POGORILER: So, Mr. Herman,
I'm sorry. I think you should finish what you
were saying. Thank you.

JUDGE SIPPEL: Thank you, sir.

THE WITNESS: Here is how I
interpret this and it goes back to something
I think we started with. Based upon my
experience the agencies have a total budget
and they allocate it to different kinds of
program content. They could allocate to news.
They could allocate to sports. They could
allocate to general life style, to life style.
They could allocate by day part to prime time.

Those budgets are -- Then you
compete for the portion of that budget that
fits your programming category. So the fact
that in this case bought it
looks like every one of the 25 channels. It

1 doesn't mean that the buyers asked us to
2 compete on the network portion because they
3 didn't. The buyers never said, "We want
4 Tennis Channel to compete with NBC or ABC."
5 The buyers didn't ask us to compete on the
6 news portion of the budget.

7 The only portion of the
8 -- And I don't know what products these
9 were. I know that on the
10 side we got the and my guess is
11 that Golf Channel and the sports channels got
12 the and that the lifestyle
13 channels might have gotten something else.

14 But we competed for the portions
15 of these buys that the buyers tell us are
16 allocated to sports. So it's not inconsistent
17 to me that those advertisers would have
18 budgets allocated to other kinds of
19 programming.

20 MR. MOSS: Now, Mr. Herman, I'm
21 not asking you about your conversations with
22 advertisers. I'm asking you after looking at

1 this chart is it still your testimony that
2 advertising overlap is indicative of
3 competition. Yes or no?

4 THE WITNESS: Yes.

5 MR. MOSS: I'm done with that,
6 sir. Thank you very much. We can look at
7 Exhibit B.

8 JUDGE SIPPEL: We've got this
9 Comcast Exhibit 801. Are you going to move
10 that into evidence?

11 MR. MOSS: Yes, Your Honor.

12 JUDGE SIPPEL: Is there an
13 objection to this?

14 MR. SCHMIDT: We wouldn't object,
15 Your Honor, to what Mr. Moss said. With Mr.
16 Moss' representation.

17 JUDGE SIPPEL: Yes. Then Comcast
18 Exhibit 801 is received in evidence at this
19 time as 801. Thank you.

20 (The document referred
21 to having been
22 previously marked for

1 identification as
2 Comcast Exhibit No. 801,
3 was received in
4 evidence.)

5 BY MR. MOSS:

6 Q Mr. Herman, you said the reason
7 that you gave that that overlap doesn't
8 illustrate competition is because you compete
9 for sports budgets. Correct, sir?

10 A I thought I said that I thought
11 the overlap did indicate competition.

12 Q I'm sorry, sir. That it does
13 indicate competition because you like other
14 sports networks are competing for sports
15 budgets. Correct, sir?

16 A Because the agencies are saying to
17 us, "We have a sports budget. And here are
18 the parameters for the buy. And you should
19 submit." So that's what they're telling us
20 before we submit.

21 Q And, sir, none of your charts show
22 any money for sports budgets. Do they, sir?

1 A I'm sorry. I don't understand.

2 Q You haven't put in any information
3 in your charts about what the sports budgets
4 are of any of these advertisers. Right, sir?

5 A Correct.

6 JUDGE SIPPEL: Should we let the
7 news in?

8 MR. MOSS: Yes, Your Honor.

9 JUDGE SIPPEL: Thank you.

10 (Off the record comments.)

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1 O P E N S E S S I O N (con'd)

2 MR. MOSS: Now, Mr. Herman, I
3 would just like to look at these charts in
4 Exhibit Tab B to your testimony.

5 This is Tab B, Your Honor.

6 JUDGE SIPPEL: Yes. Okay.

7 MR. MOSS: To Mr. Herman's
8 testimony.

9 BY MR. MOSS:

10 Q And these are Golf Channel's top
11 30 advertisers. Right, sir?

12 A These are Golf Channel's top 30
13 advertisers minus or less the ones I thought
14 were the golf club-golf ball kinds of
15 advertisers.

16 Q Okay. The ones that advertise
17 golf stuff on Golf Channel.

18 A I took those out.

19 Q You took those out. And Tennis
20 Channel 2010 didn't generally compete for
21 those types of advertisers. Right, sir?

22 A Yes. Correct.

1 Q And if you would have included the
2 actual top 30 on this chart there would have
3 been less overlap between Golf Channel and
4 Tennis Channel. Correct, sir?

5 A Yes, there would have been.

6 Q And the yellow highlights on this
7 chart, Mr. Herman, just so we're clear, those
8 don't include -- none of those highlights are
9 actually Tennis Channel advertisers. Right,
10 sir?

11 A That's correct.

12 Q And those are advertisers that you
13 make presentations to since dating back to
14 2009. Right?

15 A That's correct.

16 Q And you presented to more than 100
17 advertisers since 2009.

18 A I don't have the exact number, but
19 I'm -- my guess is it's at least 100. Yes.

20 Q And, Mr. Herman, Tennis Channel
21 again was preparing its litigation against
22 Comcast for this case in February or March of

1 2009. Isn't that correct, sir?

2 A I don't recall the specific dates
3 that Tennis Channel began preparing for a
4 case.

5 Q Well, Tennis Channel hired a
6 ratings consultant for the purpose among other
7 things of preparing for a litigation case
8 against Comcast. Isn't that correct, sir?

9 A Yes.

10 Q And Tennis Channel made that hire
11 in either February or March of 2009. Correct,
12 sir?

13 A I don't have the specific
14 recollection. I think it could have been
15 prior to that. But it wouldn't have been by
16 more than a couple months.

17 Q So it may have been in February or
18 March 2009, but it may have been before that.

19 A Yes.

20 Q Now the green highlights on this
21 chart, Mr. Herman, those advertisers are
22 advertisers who were Tennis Channel

1 advertisers in either 2009 or 2010. Correct?

2 A Yes.

3 Q So if an advertiser advertised on
4 Tennis Channel in 2009, but stopped
5 advertising in 2010, it would still be green
6 on your chart. Correct, sir?

7 A Yes.

8 Q And there's no monetary threshold
9 that you used here. For example, sir, if an
10 advertiser advertised spent \$1,000 on Tennis
11 Channel in 2009, that advertiser would still
12 be highlighted on this chart. Right, sir?

13 A Yes.

14 Q And the next page, Mr. Herman, is
15 a chart of the top 30 for Versus and Tennis
16 Channel. And you prepared this chart in the
17 same way as the Golf chart. Correct, sir?

18 A I oversaw the preparation of this
19 chart the same way.

20 Q Thank you. Using the same
21 methodology?

22 A Yes.

1 Q And, Mr. Herman, we just looked at
2 three charts that you prepared. The first one
3 had Tennis Channel's top 30 advertisers. The
4 second one had Golf Channel's top 30
5 advertisers. And the third one had Versus'
6 top 30 advertisers. Correct, sir?

7 A Correct.

8 Q And did you ever look at -- Did
9 you ever think "Well, maybe I'll do an apples-
10 to-apples comparison and I'll see what is the
11 Tennis Channel's top 30 compared to the Golf
12 Channel's top 30 using the same years and the
13 same fact that they're in the top 30?

14 A What's the question?

15 Q Did you ever compare the overlap
16 between the Tennis Channel's top 30 in 2010
17 which we looked at on your first chart and the
18 Golf Channel's top 30 of 2010?

19 A No. I didn't and I wouldn't see a
20 need to do that.

21 Q And did you ever compare the top
22 30 between Tennis Channel 2010 and Versus